

CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION  
MINUTES OF MEETING, Public Session

January 20, 2006

Call to order: Chairman Liane Randolph called the monthly meeting of the Fair Political Practices Commission (Commission) to order at 9:48a.m., at 428 J Street, Eighth Floor, Sacramento, California. In addition to Chairman Randolph, Commissioners Sheridan Downey, Eugene Huguenin, and Ray Remy were present.

**Item #1. Public Comment.**

There was none.

**Consent Items #2-15.**

Commissioner Remy pulled item #2, approval of the December 1, 2005, Commission meeting minutes to note a typographical error at the bottom of page 19.

Chairman Randolph complimented the Enforcement Division on its extensive calendar and specifically the effort put into completing some of the Ryan cases.

Commissioner Downey pulled Item #10, In the Matter of Michael Peevey, FPPC No. 03/104.

Commissioner Downey moved to approve the following items in unison:

**Item #2. Approval of the December 1, 2005, Commission meeting minutes.**

**Item #3. In the Matter of TME – AFSCME Local 1117 Political Action Committee, FPPC No. 02/158 (2 counts).**

**Item #4. In the Matter of Robert Egan, FPPC No. 02-012 (1 count).**

**Item #5. In the Matter of J. Taylor Crandall, FPPC No. 05-456 (3 count).**

**Item #6. In the Matter of Italian Center, Inc., FPPC No. 03/516 (1 count).**

**Item #7. In the Matter of Scott Cook, FPPC No. 05/298 (5 counts).**

**Item #8. In the Matter of California Campaign for New Drug Policies, Yes on Prop. 36 and Dave Fratello, FPPC No. 02/1059 (7 counts).**

**Item #9. In the Matter of Dennis Hansberger, FPPC No. 03/663 (2 counts).**

**Item #11. In the Matter of Charles Drake, FPPC No. 05/407 (1 count).**

**Item #12. In the Matter of Dale White, FPPC No. 05/423** (1 count).

**Item #13. In the Matter of Vance McAlister, FPPC No. 05/415** (1 count).

**Item #14. Failure to Timely File Major Donor Campaign Statements:**

- a. In the Matter of Professional Exchange Service Corporation, FPPC No. 05/458.** Professional Exchange Service Corporation of Fresno failed to timely file a semi-annual campaign statement disclosing contributions totaling \$144,804.62 in 2004 (1 count).
- b. In the Matter of Pacific Cement, FPPC No. 05/600.** Pacific Cement of San Francisco failed to timely file semi-annual campaign statements disclosing contributions totaling \$19,250.00 in 2002 (2 counts) and \$36,200.00 in 2003 (2 counts).
- c. In the Matter of Pac Pizza, FPPC No. 05/708.** Pac Pizza of San Ramon failed to timely file a semi-annual campaign statement disclosing contributions totaling \$15,000.00 in 2004 (1 count).
- d. In the Matter of Tracy Snyder, FPPC No. 05/709.** Tracy Snyder of New York, New York failed to timely file a semi-annual campaign statement disclosing contributions totaling \$10,000.00 in 2004 (1 count).
- e. In the Matter of Jay Snyder, FPPC No. 05/710.** Jay Snyder of New York, New York failed to timely file a semi-annual campaign statement disclosing contributions totaling \$15,000.00 in 2004 (1 count).
- f. In the Matter of Caremark RX, FPPC No. 05/805.** Caremark RX of Nashville, Tennessee failed to timely file a semi-annual campaign statement disclosing contributions totaling \$25,000.00 in 2004 (1 count).
- g. In the Matter of Chris T. Sullivan, FPPC No. 05/810.** Chris T. Sullivan of Tampa, Florida failed to timely file a semi-annual campaign statement disclosing contributions totaling \$10,000.00 in 2004 (1 count).
- h. In the Matter of Cuneo Gilbert & Laduca, LLP, FPPC No. 05/811.** Cuneo Gilbert & Laduca, LLP of Washington, DC failed to timely file a semi-annual campaign statement disclosing contributions totaling \$25,000.00 in 2004 (1 count).
- i. In the Matter of Lucent Technologies, Inc., FPPC No. 05/813.** Lucent Technologies, Inc. of Vienna, Virginia failed to timely file a semi-annual campaign statement disclosing contributions totaling \$25,000.00 in 2004 (1 count).

- j. In the Matter of Triumph Mortgage, Inc., FPPC No. 05/815.** Triumph Mortgage Inc. of Irvine failed to timely file a semi-annual campaign statement disclosing contributions totaling \$10,000.00 in 2004 (1 count).
- k. In the Matter of Panda Restaurant Group and Its Owners, Andrew and Peggy Cherng, FPPC No. 05/839.** Panda Restaurant Group and Its Owners, Andrew and Peggy Cherng of Rosemead failed to timely file semi-annual campaign statements disclosing contributions totaling \$16,000.00 in 2001 (2 counts) and \$67,240.00 in 2002 (1 count).
- l. In the Matter of Frank J. Biondi, Jr., FPPC No. 05/853.** Frank J. Biondi, Jr. of Los Angeles failed to timely file a semi-annual campaign statement disclosing contributions totaling \$11,000.00 in 2001 (1 count).
- m. In the Matter of Harvey Wm. Glasser, FPPC No. 05/854.** Harvey Wm. Glasser of San Francisco failed to timely file a semi-annual campaign statement disclosing contributions totaling \$10,000.00 in 2002 (1 count).
- n. In the Matter of Pro Staff, FPPC No. 05/855.** Pro Staff of Minneapolis, Minnesota failed to timely file a semi-annual campaign statement disclosing contributions totaling \$10,000.00 in 2002 (1 count).
- o. In the Matter of American Xtal Technology, Inc., FPPC No. 05/856.** American Xtal Technology, Inc. of Fremont failed to timely file a semi-annual campaign statement disclosing contributions totaling \$10,000.00 in 2001 (1 count).
- p. In the Matter of Allan K. Jonas, FPPC No. 05/857.** Allan K. Jonas of Los Angeles failed to file semi-annual campaign statements disclosing contributions totaling \$30,450.00 in 2002 (2 counts); \$32,000.00 in 2003 (2 counts); and \$27,250.00 in 2004 (2 counts).
- q. In the Matter of Johnson Canyon Holdings, LLC, FPPC No. 05/858.** Johnson Canyon Holdings, LLC of Beverly Hills failed to timely file a semi-annual campaign statement disclosing \$ 12,500.00 in 2002 (1 count).
- r. In the Matter of William Cramer, FPPC No. 05/867.** William Cramer of Anaheim failed to timely file a semi-annual campaign statement disclosing \$10,000.00 in 2001 (1 count).
- s. In the Matter of Ultramar Diamond Shamrock Corporation, FPPC No. 05/876.** Ultramar Diamond Shamrock Corporation of Mill Valley failed to timely file semi-annual campaign statements disclosing \$42,975.00 in 2001 (2 counts).

- t. **In the Matter of American Health Care Association, FPPC No. 06/006.** American Health Care Association of Washington DC failed to timely file a semi-annual campaign statement disclosing \$15,000.00 in 2002 (1 count).
- u. **In the Matter of Richard Wollack, FPPC No. 06/007.** Richard Wollack of Napa failed to timely file a semi-annual campaign statement disclosing \$11,252.91 in 2002 (1 count).

**Item #15. Failure to Timely File Late Contribution Reports – Proactive Program:**

- a. **In the Matter of Edison International and Affiliated Entities, FPPC No. 05/561.** Edison International and Affiliated Entities of Rosemead failed to timely disclose a late contribution totaling \$100,000.00 (1 count).
- b. **In the Matter of Lee Andrews Group, Inc., FPPC No. 05/562.** Lee Andrews Group, Inc. of Los Angeles failed to timely disclose a late contribution totaling \$10,000.00 (1 count).
- c. **In the Matter of Amir Salimzadeh (a.k.a. Joseph Salim), FPPC No. 05/711.** Amir Salimzadeh (a.k.a. Joseph Salim) of New York New York failed to timely disclose a late contribution totaling \$10,000.00 (1 count).
- d. **In the Matter of Caremark RX, FPPC No. 05/794.** Caremark RX of Nashville, Tennessee failed to timely disclose a late contribution totaling \$25,000.00 (1 count).
- e. **In the Matter of Cuneo Gilbert & Laduca, LLP, FPPC No. 05/812.** Cuneo Gilbert & Laduca, LLP of Washington, DC failed to timely disclose a late contribution totaling \$25,000.00 (1 count).
- f. **In the Matter of Lucent Technologies, Inc., FPPC No. 05/814.** Lucent Technologies, Inc. of Vienna, Virginia failed to timely disclose a late contribution totaling \$25,000.00 (1 count).
- g. **In the Matter of Triumph Mortgage, Inc., FPPC No. 05/816.** Triumph Mortgage, Inc. of Irvine failed to timely disclose a late contribution totaling \$10,000.00 (1 count).

Commissioner Remy seconded the motion. Commissioners Downey, Huguenin, Remy, and Chairman Randolph supported the motion, which carried with a 4-0 vote.

**ITEM REMOVED FROM CONSENT**

**Item #10. In the Matter of Michael Peevey, FPPC No. 03/104.**

Commissioner Downey wondered if Mr. Peevey had repaid the \$750 to the parking commission at San Francisco International Airport (SFIA).

(Commissioner Blair arrived at the meeting.)

Amanda Saxton, Commission Counsel, explained that the applicable gift limit was \$320, therefore the respondent exceeded the gift limits by \$430, not \$750.

Commissioner asked if Mr. Peevey had repaid any of the improper use to the parking authority.

Amanda Saxton replied that there is no knowledge of any repayment to the SFIA parking commission. The fine amount was based on what the respondent should not have accepted. Mr. Peevey was entitled under the gift limits to accept \$320.

John Appelbaum, Chief of Enforcement, added that there were difficult issues presented in that there were mitigating circumstances from the Enforcement Division point of view because this individual was receiving cancer treatment and was clearly entitled to park there. It did not seem as if Mr. Peevey had intended to abuse the privilege.

Commissioner Downey moved to approve item #10.

Commissioner Huguenin seconded the motion. Commissioners Downey, Blair, Huguenin, Remy and Chairman Randolph supported the motion, which carried a 5-0 vote.

Chairman Randolph explained that Item #16 and Item #17 are informational items.

## **ACTION ITEMS**

### **Item #18. In the Matter of Allen K. Settle, FPPC No. 99/804.**

Melodee Mathay, Senior Commission Counsel, presented the proposed decision following a finding of probable cause and a three count accusation against Allen Settle, who is currently a member of the San Luis Obispo City Council and served as the city's mayor from 1994 through 2002. The accusation alleged that Mr. Settle committed three violations of the conflict of interest provisions of the Political Reform Act (Act) in 1999 stemming from his making and participating in making three governmental decisions in connection with the annexation and development of a one hundred thirty-one acre parcel of land known as the Dalidio Property in San Luis Obispo County. Mr. Settle had an interest in residential property that was located adjacent to the project's boundaries. After being served with the accusation, Mr. Settle filed a notice of defense and requested an administrative hearing that was held in San Luis Obispo on the 19<sup>th</sup> and 20<sup>th</sup> of September, 2005 before Administrative Law Judge Humberto Flores from the Office of Administrative Hearings in Los Angeles.

Ms. Mathay explained that on behalf of the Enforcement Division, she represented the complainant in prosecuting this case before Judge Flores and Mr. Settle represented himself.

Oral evidence was presented in the form of six witnesses testifying under oath, and twenty-seven exhibits of documentary evidence were submitted. Mr. Settle called only himself as a witness, was subject to cross-examination, and he submitted documentary evidence in the form of Exhibits A through K. Following closing oral arguments on September 20, 2005, Judge Flores considered the case. The Judge re-opened the record on October 21, 2005, for the sole purpose of obtaining physical copies of the conflict of interest regulations that were in effect in 1999, which were cited during oral argument and in the complainant's administrative hearing brief. Those regulations were submitted and the record was closed. On October 28, 2005, Judge Flores issued the proposed decision. Mr. Settle filed a response brief in which several items Mr. Settle challenged not considered in Judge Flores' deliberation. All of those concerns are addressed in the complainant's reply brief.

Ms. Mathay went on to explain that there are factual findings to support each of the elements of the conflict of interest violations. There is factual finding that Mr. Settle was a public official and that he made and participated in three governmental decisions concerning the Dalidio property and the development project that had been proposed for that property. There is also a factual finding that Mr. Settle had an interest in residential property, a rental home, the boundaries of which were adjacent to the parcel that was the subject of the application for annexation. Mr. Settle's interest in that property was indirectly affected, rather than directly affected in the governmental decisions at issue and the Judge found that it was reasonably foreseeable that those decisions would have an effect on his interest in real property. Mr. Settle has argued that there were some appraisals and opinion letters that he submitted as evidence. The Judge took the appraisals and letters into consideration and they are part of the record as legal argument, but each of the appraisals and opinion letters were produced after the decisions at issue. The opinions and appraisals were performed after the project developer had split the project and moved the commercial development farther away from Mr. Settle's property with, what appears to be, the purpose of allowing Mr. Settle to vote on the project.

Ms. Mathay concluded that the Enforcement Division contends that the factual findings and legal conclusions set forth in the proposed decision are supported by the oral and documentary evidence that was properly admitted at this hearing; and that the proposed decision does set forth the proper application of the conflict of interest laws and regulations that were in effect at the time. Further, Ms. Mathay contended that Judge Flores' order for Mr. Settle to pay \$2,000 for each violation, for a total of \$6,000, is appropriate for the facts and circumstances of this case. Ms. Mathay requested that the Commission adopt this proposed decision in its entirety.

Chairman Randolph reviewed the process in which the Commission will hear argument and arrive at its decision. The Commission will hear from the Enforcement Division and then from the Respondent. At that point, the Commissioners will adjourn to closed session and make a decision as to whether the Administrative Law Judge's proposed decision will be adopted.

Commissioner Downey noted a reference on page five, finding twenty in the Administrative Law Judge's findings to the testimony of the complainant's appraiser and noted that there was no summary of the opinion of this expert, who is characterized as a licensed real estate appraiser with twenty years experience and who specializes in appraising residential properties.

Ms. Mathay replied that the complainant's appraiser testified that the development would have increased the value of Mr. Settle's property, based on the size and complexity of the proposed plan.

Commissioner Downey asked if a figure was given regarding how much the value of the residential property would increase.

Ms. Mathay responded that no figure was given, but that due to the property being within 300 feet of the land being developed, it is presumed material and a specific dollar amount was not necessary.

Chairman Randolph opened the floor to the respondent.

Allen Settle, Vice Mayor for the City of San Luis Obispo, addressed the Commission with three fundamental reasons why he believes that the Administrative Law Judge (ALJ) is incorrect on this matter. The issue at hand is the public generally exception because the subject was a highway overpass interchange. The second reason why the ALJ is incorrect is one of foreseeability and that the Act does provide exceptions to public generally. The third reason Mr. Settle gave was regarding a researched appraisal done to the standards of the FPPC that indicates there would be no financial effect, regardless of which phase the project may take. The Prado Road overpass, which was at issue on 1999, really involved a major linking for over thirty years trying to connect the eastern side of San Luis Obispo to the western side. That would involve 20,000 people in terms of traffic transportation. This is a "public generally" exception, according to Mr. Settle.

Mr. Settle argued that having participated in a pre-development discussion of how the infrastructure would be financed, regardless of who the developer would be, was not a violation. The applicant did not have to use the discussion in order to proceed with the project, as it was not a condition of development. This particular application was not even on the agenda at the time.

Commissioner Downey asked if Mr. Settle knew at the time that were the council to reject the request to negotiate a memorandum of understanding regarding the proposed development and annexation, that would have most likely stopped the project from going any further.

Mr. Settle replied that there had been talk about that, but the applicant said that the discussion was only exploratory and the cooperation from the council would be helpful, but it would not stop the project. It was clear to the applicant that this was not a condition of the development.

Mr. Settle moved on to the question of foreseeability. This project had been discussed for a decade. It was not known if the applicant had the capacity or the support of the tenants to complete this project. It is critical to recognize that a city council cannot dictate who a tenant is. It was not reasonably foreseeable at that time that there would be any material financial effect.

Mr. Settle continued with the third factor in determining that the ALJ decision is incorrect. Researched appraisals were requested by both Mr. Settle and the applicant. The appraisals were completed by an individual who knows the area very well, and who determined that there would

be no material financial effect on the residential property, none that was measurable anyway, regardless of which phase the project was to be developed.

Chairman Randolph asked about the argument that the appraisal was addressing a particular phase of a phased development whereas that decision in which Mr. Settle participated in 1999 was before the development was a phased development, when it was all one development.

Mr. Settle responded that the type of development was not referenced and the council at that time, in which Mr. Settle chaired as mayor, was not aware of what the applicant was going to do. The application was not anywhere close to maturity and not on the agenda.

Chairman Randolph asked about the argument that the Memorandum of Understanding (MOU) was discussed in the context of the application back in April of 1999, which is finding #13.

Mr. Settle answered that the option of looking at this application was something that was beyond the scope of the 1999 discussion. This application, in terms of whether it will include the entire ranch of 130 acres or this one segment of the ranch, was not yet understood. When the applicant first approached the council, a portion of 40 acres out of the 130 acres was all that was being considered. Those 40 acres are better than 700 feet from the residential property. The ALJ is incorrect because it only assumed a measurement interpretation, and not what was actually discussed in 1999. If the appraiser says that Mr. Settle could have voted on the actual project, then Mr. Settle should certainly be able to discuss the financing of an infrastructure such as an overpass. Clearly that would fit the public generally exception and the foreseeability matter.

Mr. Settle concluded by saying that compliance with the law is always the intention and the reason for addressing the Commission is to express the significance in being able to discuss important public infrastructure matters. The rules that were operating in 1999 have changed. Several of the city attorneys have express confusion in interpreting this particular aspect so it is unclear how someone who is not an attorney can understand it. Mr. Settle indicated he had a written statement he wanted to submit to the Commission which included points and authorities outlining the argument.

Chairman Randolph asked the Legal Division staff if additional information is acceptable at this time and it was suggested that the material be reviewed by the Legal Division attorneys for a decision on whether the information was evidence or argument, and if it would be acceptable.

Mr. Settle submitted the information to the Legal Division staff for review.

Commissioner Downey asked Mr. Settle if any of the many possible conflicts resulting from the location of the development project, in relation to the residential property owned by the respondent, had occurred to Mr. Settle during the time of discussion.

Mr. Settle replied that had those possibilities come to mind, Mr. Settle would have left the discussion. The fact is that no one involved in the project questioned Mr. Settle's presence during the discussions.

Commissioner Downey asked Mr. Settle if the value of the adjoining property would have been affected, had the development project come to fruition.

Mr. Settle replied that the effects of the development project on the value of the adjacent property was not foreseeable and the appraisal showed that there would be no effect. The council was not near a development stage, and was only discussing possible financing.

Commissioner Blair questioned the close votes regarding governmental decisions made by the San Luis Obispo City Council in April and September of 1999, in which Mr. Settle participated. One of the decisions authorized negotiation of the MOU between the city and the applicant for development of the Dalidio Property and the other approved that MOU. Both votes were three-to-two and Commissioner Blair wondered, if MOUs are usually unanimous because the city has nothing to lose, why the votes were so close in this case.

Mr. Settle said this was because the project was very controversial and it was unclear if the city would be able to pay for it.

Commissioner Blair asked why two of the five Council members were opposed to even an MOU.

Mr. Settle responded that those two individuals did not want any part of the project and still do not.

Chairman Randolph reminded Mr. Settle that the MOU was an agreement with a developer who was associated with a particular project to develop a piece of property that was within 300 feet of the residential property.

Mr. Settle said that at that time the council did not know the status or size of that property.

Chairman Randolph asked if Mr. Settle knew what developer was a party to the MOU.

Mr. Settle answered that the developer was not yet known.

Chairman Randolph asked if Mr. Settle was saying that he did not know that the other party in the MOU was planning on developing the Dalidio Project.

Mr. Settle replied that it was known that the individual was going to develop the Dalidio Project but the interest that Mr. Settle had in this particular MOU was that it set a standard for all other participants as to what percentage would be needed to pay for the freeway interchange.

Commissioner Blair confirmed that the MOU that the council supported was negotiating around property that was within three hundred feet of Mr. Settle's property.

Mr. Settle said that the location of the development being adjacent to the residential property had not come to mind at the time because the focus was on finding a way to pay for a major capital improvement.

Commissioner Remy asked Mr. Settle if his Oceanaire property was noted on his Annual Statement of Economic Interest any earlier than 1999.

Mr. Settle replied that the property had been noted previously.

Commissioner Downey commented that the property was noted by the assessors parcel number (APN) and not by the street address.

Mr. Settle confirmed that the property had been noted only by APN due to privacy reasons.

Commissioner Remy asked Mr. Settle if, having noted it in previous Statements of Economic Interest, the subject of his ownership of that property had ever come up in any discussion of the Council.

Mr. Settle answered that the subject has never come up.

Chairman Randolph asked the legal staff about the validity of the written statement that Mr. Settle wanted to submitted to the Commission.

Emelyn Rodriguez, Legal Counsel, replied that the statement is a summary of what Mr. Settle argued and could be accepted.

Ms. Mathay objected to the acceptance of the written materials citing regulation 18361.9, which gives a briefing schedule for written argument, and that the only provisions for oral argument are today. Any written materials considered by the Commission, which the Enforcement Division has not been given the chance to respond to, are outside the briefing schedule for a proposed decision. It is not clear what is in the brief, and whether it replicates what Mr. Settle stated today.

Ms. Rodriguez stated that the brief appears to be a summary of what Mr. Settle already stated in his written brief.

Commissioner Downey asked for Legal Counsel's response to the Enforcement Division's argument. Is the material actually a supplemental brief of what has been said and written?

Ms. Rodriguez replied that the material does not appear to be a supplemental brief.

Ms. Mathay requested a copy of the brief, and noted that the Enforcement Division retained the right to challenge anything that is not acceptable through the process of reconsideration.

Chairman Randolph opened the floor for the Enforcement Division to respond.

Ms. Mathay addressed Mr. Settle's comments, beginning with the statement that the public generally exception had not been considered, and directed the Commission to discussion item #37 on page eight of the proposed decision where the judge said that the respondent did not establish that the effect of his decision on his financial interest is indistinguishable from the

effect on the public generally. Regarding the references made by Mr. Settle to not being aware that the application was before the city council, Ms. Mathay cited factual findings 3-7 in the proposed decision in which the judge says there was an application filed by SC Properties, LLC. The application was for the annexation of the 130 acres parcel of land and the development. The city planner testified on the record about the application and what it encompassed, and the application was referenced during the city council meetings.

Ms. Mathay explained that the appraisals and legal opinion letters that Mr. Settle claims to have had in hand in 1999 were drafted after the governmental decisions in the case. Additionally, the 3-to-2 votes were controversial, and there were opponents to the project because it was a major building project on an historical agricultural working farm that sits on the south-western portion of San Luis Obispo. After the close votes, it was discovered that Mr. Settle owned the Oceanaire property and it had not been public knowledge because of the use of the APN. When that information came to light, the developer was concerned that the third vote was lost, and wanted opinions on how to save the project. That point is when the decision was made to bifurcate the project into phase one and phase two, which set new parameters and made proving a conflict of interest more difficult.

Ms. Mathay stated that several of Mr. Settle's statements are incorrect regarding the evidence. The MOU was approved on September 21, 1999, and it was a detailed document involving financing for the Prado Road Interchange. The project moved forward and the environmental impact report came before the city in 2001. At that point, the Enforcement Division made a recommendation to Mr. Settle not to vote on this matter because there was an open enforcement action. Mr. Settle abstained and has done so ever since.

Chairman Randolph asked Mr. Settle if there were any other comments.

Mr. Settle reiterated that the public generally, the foreseeability, and the appraisals show that even if Mr. Settle had voted on the matter, there would not have been a material financial effect. The MOU was an approval in concept, an actual development agreement could not have been approved at that stage because the application had not come to the council yet. The status of the application at the time, in 1999, was not known. The item on the agenda was only to consider financing. Mr. Settle asked for the Commission's consideration in dismissing this matter.

Chairman Randolph noted that the matter will be considered in closed session, later in the agenda.

**Item #19. Discussion of Amendments to the Aggregation Regulations – 18225.4 and 18428 and Adoption of Regulations 18215.1, 18205, and 18531.11.**

Bill Lenkeit, Senior Commission Counsel, began with a visual presentation illustrating the project, which examines the Commission's rules pertaining to aggregation of campaign contributions and independent expenditures. There are five regulations involved and three primary concerns are addressed. The first concern is whether the Commission should adopt regulation 18215.1, codifying its long-standing position regarding aggregations of contributions for purposes other than those already provided under section 85311 for contributions to state

candidates. The second concern is whether the Commission should define, under proposed regulation 18205, the direction and control standard used for aggregating contributions and independent expenditures, and confirm whether this standard may be applied solely to one individual or whether it may encompass more than one individual. Along with this issue is the question of whether the Commission should adopt certain standards to be used in determining when contribution decisions are made independently of each other. The last concern asks if the rules pertaining to how aggregated contributions and independent expenditures need to be clarified under regulation 18428. The extensive background pertaining to this project is discussed in the staff memorandum.

Mr. Lenkeit explained, regarding the first issue, that in early 1995, recognizing a need to codify Commission policy on aggregation of contributions and independent expenditures, two regulations were adopted specifying the circumstances under which aggregation would be required. Those provisions remain applicable today and are the subject of this project. With the exception of one regulation's application to contributions and the other to independent expenditures, the two sister regulations contained identical language - Regulation 18215.1 Contributions; When Aggregated, and Regulation 18225.4 Independent Expenditures; When Aggregated. Following the direction of the Commission's *Lumsdon* and *Kahn* opinions contributions or independent expenditures were to be aggregated under three situations. First, if an entity's contributions or independent expenditures were directed and controlled by an individual, they are aggregated with the contributions or independent expenditures made by that individual. The second situation is if two or more entities make contributions or independent expenditures that are directed and controlled by a majority of the same individuals, all of the entity's contributions or independent expenditures are aggregated.

Chairman Randolph confirmed that the aggregation is not just for major donor purposes but for contribution limit purposes as well.

Commissioner Downey confirmed that the aggregation was also for independent expenditures and that all of this information was current law and not new regulation.

Mr. Lenkeit said that there was nothing new so far with the regulation and continued with the second of the three situations where contributions and independent expenditures would be aggregated. The rule is most often applied to corporations with a majority of the same controlling members or limited partnerships with the same controlling partners. The last situation creates the presumption that the majority owner of an entity makes the decisions and contributions or independent expenditures made by entities that are majority owned are aggregated with the contributions or independent expenditures of the majority owner, unless the entities act completely independently in their decisions. The independent expenditure regulation remains today exactly as it was when it was adopted in May 1995, however, regulation 18215.1 applying to contributions was repealed in the wake of the passage of Proposition 208's contribution limits in 1996 and the regulations replacing it were never given effect. With the passage of Proposition 34 in 2000, regulation 18215.1 was resurrected with minor changes as a statute in 85311, defining aggregation for purposes of the new campaign contribution limits and the provisions of the statute were made applicable to those limits only. As it was at the time of the original adoption of regulation 18215.1, the Commission is in the position of not having a

regulation that adequately defines Commission policy on the aggregation of contributions since the statute applies only to contributions for state candidates. Staff believes that this regulation is needed to clearly define Commission policy with regard to aggregation of contributions in other settings, including major donor reporting and for local contribution limits where the local agency follows the definitions provided in the Act. Proposed regulation 18215.1 addresses that need. The regulation uses identical language from the statute and while adding a definition for the term aggregate and incorporating a reference to proposed regulation 18205's definition of the terms whose contributions are directed and controlled, which is discussed in the second part of this project.

Chairman Randolph suggested discussing the comment letter that was received, which raises the threshold issue of 85311 having codified the former 18215.1, what the need would be for a regulation. One answer would be to have an aggregation standard that applies to something other than just state candidates. However, that could be done by mirroring 85311 in a regulation.

Mr. Lenkeit responded that it is necessary to have the regulation in some form for the reasons already stated because the statute only applies to contributions for state candidates. However, it would work either way, although this would add a definition of aggregate, which may be helpful.

Luisa Menchaca, General Counsel, added one factor which may be confusing is that the same regulation number is being used. This does not necessarily mean the regulation is conceptually the same. A key part of this is that the factors that are included came from the Commission's opinions.

Chairman Randolph clarified that there are two questions to discuss. The first is whether or not to take 83511 and apply it to non-Prop 34 limit situations. Staff's opinion is that adopting 18215.1 would codify the *Lumsdon* and *Kahn* opinions and apply them to all contribution contexts. The second issue is whether 18205 is needed and if further definition of "direction and control" as it appears in 85311 in the context of Prop 34.

Mr. Lenkeit explained that those are the questions being presented to the Commission for decision. The question of what exactly in direction and control and who determines it has been a difficult issue for the Enforcement Division. Currently, the advice that is obtained now comes through opinion and advice letters where the facts are presented. However, if there is a dispute as to who has direction and control, it is difficult to discern without all the facts. The purpose here is to lay out some guidelines to determine that.

Commissioner Downey asked about the Olson comment letter's concern about local jurisdictions.

Mr. Lenkeit replied that the guidelines would only apply to local jurisdictions who want to use them. Some local jurisdictions refer to the definitions provided in the act. If local jurisdictions had their own rules, then those would apply.

Chairman Randolph asked if a local jurisdiction had no contribution limits then 18215.1 would apply and if that local jurisdiction adopted contribution limits then the local jurisdiction would decide whether to adopt all the Commission's definitions or choose not to.

Commissioner Huguenin asked if there was a provision in the draft regulation that makes the impact or non-impact on the local governments clear or is it the conclusion of law that arguably follows in the circumstances.

Chairman Randolph opined that it would be the latter.

Commissioner Huguenin asked if Mr. Olson's comment about a potential conflict from the person giving advice to the local government regarding the determination of whether the local rule somehow preempts the Commission's regulations is a valid point.

Ms. Menchaca replied that Mr. Olson's concern is a good point but that the conflict exists now because local jurisdictions, when it comes to reporting and determine what contributions should be aggregated, is to be done under the Commission's guidelines for opinions. This would make it more clear to local governments what to consult. The draft currently does not make specific reference on the impact to local jurisdictions, there could certainly be something written for that.

Mr. Lenkeit added that the regulation does not apply to state contribution limits because that is covered in 85311 but it takes the same requirements and applies them to all the other thresholds in chapter 4 and chapter 5 of the Act. If any local jurisdiction wants to adopt the regulation as their rule, they may do so.

Commissioner Downey stated that it is likely that local jurisdictions have already adopted rules.

Ms. Menchaca mentioned that regulations were drafted that would address contribution limits of 85311 separate from the reporting aspect. What was found after going through the process was that there is maybe one difference between the reporting and the contribution limit in 85311. There may not be a need for a regulation for reporting and a separate regulation for 85311. That was the goal of going through that process.

Mr. Lenkeit said that the first goal was to clarify reporting roles under 18428 and when the interested persons' meeting was held, one issue that arose was that currently the Commission does not have a regulation that defines aggregation of contributions because of the hole that was left when the regulation was repealed. The statute that came into affect only applied to campaign contributions for state candidates.

Commissioner Huguenin said that he had attended the interested persons' meeting and this project has grown considerably since the discussion at that meeting.

Mr. Lenkeit continued with the staff report which proposed amendments to the original sister regulation 18225.4 which deals with aggregation of independent expenditures. These amendments would conform the language to the proposed regulation and existing statute so that Commission policy on aggregation would be consistent in its application. The second part of the

project, proposed regulation 18205, attempts to set some parameters in defining direction and control, and what constitutes circumstances indicating that the parties acted independently. Subdivision (a) provides certain presumptions of direction and control and subdivision (b) delves into the mean of “clear from the surrounding circumstances” that different sources acted completely independently of each other in their decisions to make payment. While the terms “direction and control” and “clear from the surrounding circumstances that persons acted independently of each other” date back to *Lumsdon* and *Kahn*, very little guidance has been provided since as to how these factors are determined. One important distinction has been made, however, and applied in staff advice letters dating back to 1989, this longstanding advice has limited the direction and control test to one individual. Under this advice, if one individual has exclusive direction and control of an entity’s contributions, the contributions of the entity are aggregated with the individual, but if the entity’s contributions decisions are made by more than one individual, no one individual has exclusive direction and control over the decision. Therefore, the entity’s contribution is not aggregated with any of the individuals.

Mr. Lenkeit explained that subdivision (a)(1) first confirms the presumption that a majority share holder directs and controls unless the entity clearly acted independently of the majority owner. In subdivision (a)(2), decision point one presents the option of codifying the single individual aggregation rule or extending it to others if they also make the decision. Staff admits, at this point, that further language would have to developed if the Commission decides to extend direction and control beyond a single exclusive individual. The intent of this language was to present the Commission with the option of codifying the current advice applying to single individual test or opening the question for further examination. If the Commission adopts the single individual rule, subdivision (a)(3) becomes obsolete. If, however, the Commission decides to explore extending the test beyond a single individual, subdivision(a)(3) is intended to apply to 50/50 owners where each owner, by virtue of his or her equal voting interest, must approve the payment in order for it to be made. Staff concedes any argument that the present use of the term authorization could be viewed as overly broad, and that the language would need refining if the Commission desires staff to present language adding a limited 50/50 option or further extending direction and control to others who make the decision. Subdivision (a)(4) proposes to codify current advice that a sponsored committee and presumed to be directed and controlled by it’s sponsor unless it is clear from the surrounding circumstances that the sponsored committee acted independently of its sponsor. This would apply the same exception applicable to majority owned entities.

Mr. Lenkeit moved on to subdivision (b) which offers certain factors that would establish independent action in the decision to make the payment. Subdivision (b)(1) applies to entities that are majority owned or sponsored by another entity. Subdivision (b)(2) applies to entities that are majority owned by an individual.

Commissioner Downey asked is this was going to be the only way to demonstrate the independence of the decisions.

Mr. Lenkeit replied that this is just the suggested language.

Commissioner Downey mentioned that line three on the second page of the proposed regulation refers to making payments for a contribution or independent expenditure when they can demonstrate all of the following. If “if and only if” was inserted, that may close the door on any other attempts to demonstrate an independent action.

Mr. Lenkeit responded that these three subdivisions were sent by the Enforcement Division.

Commissioner Downey suggested that using “when” instead implies that may be other ways. The idea seems to be that the intention was to put forth an exclusive list.

Mr. Lenkeit continued with subdivision (b)(2) which says that an individual who is a majority owner must meet a fourth requirement that he or she exercises no control over the day to day operation of the entity. The third part of this project examines the aggregation reporting regulation 18428. This project was initially conceived with this examination in mind as a further look into clarifying the reporting rules after revisions to the regulation resulting in the passage of Proposition 34. The project was expanded to the area discussed above based on initial feedback received. The proposed amendments to regulation 18428 eliminate concept of affiliated entities. The term did not seem to add anything, other than perhaps some confusion in defining aggregation. Subdivision (a) first clarifies that the aggregation provisions apply to all thresholds identified in chapter 4 and chapter 5 of the Act. Subdivision (b) provides reporting requirements for aggregation for major donor and independent expenditure committees. While the current regulation and proposed amendments both require the report to be filed in the name of the person that directs and controls the payment, decision point 2 offers two options to clarify what information is requirement under the name of filer block on the report. Option 1 requires the filer to include the names of each entity whose contributions are independent expenditures or aggregated with those of the filer. Option 2 requires only that the filer indicate under the name of filer that other aggregated contributions are included in the report. Both options would require in a change in the Form 461 and staff would be prepared to submit those changes in the form once the Commission has decided which option is appropriate.

Chairman Randolph asked how the contributions are currently reported.

Mr. Lenkeit replied that there is confusion in that area right now because the regulation is subject to two interpretations. It seems that the regulation says to report it with “and affiliated entities” after the name but the form says “name of filer including affiliated entities,” which implies that all names would have to be included.

Chairman Randolph clarified that the regulation currently has language more akin to option two.

Mr. Lenkeit continued with the reporting options, which both require that each contribution or independent expenditure be separately itemized within the report.

Commissioner Remy asked how the aggregation would work for a committee made up of executives who each individually contribute through their own corporations, and then the committee that is made up of those individuals also makes the decision contribute.

Mr. Lenkeit replied that the individual corporations would aggregate their contributions with each of the individuals. Those corporations would not have to aggregate with the committee because only one of each would be the same as any other entity.

Commissioner Downey confirmed that there would have to be a majority in the committee in order for aggregation to be required.

Chairman Randolph asked if that would change based on which decision point was applied.

Mr. Lenkeit responded that the aggregation would not change.

Commissioner Downey wondered if the Enforcement Division is having many issues with “direction and control” being a troublesome area for the regulated community.

Mr. Lenkeit replied that the Enforcement Division would have to look into how many complaints are received and as far as enforcement of this area, they could use better guidance to make investigating easier.

Commissioner Huguenin stated that what tends to happen after these regulations are adopted is that the Commission encourages corporate and other entities to build the criteria that has been specified if the corporations do not want to be aggregated into their policies and decisions.

Chairman Randolph asked for any public comment.

Kathy Donovan, of Pillsbury Winthrop Shaw Pitman LLP, expressed concerns about bringing in more than one individual. The direction and control concept should mean that one individual or entity is in control. The Commission is asked to steer clear of the confusion that occurs with having more than one person making decisions. Another concern is that using the majority owned concept in 18205 to deal with sponsored committees is a confusing factor. The entity’s decisions should be made by a committee separate from its sponsor. As currently drafted, 18205 treats the sponsor and its sponsored PAC as if it were majority owned. That does not seem to fit with 85311 for purposes of limits.

Commissioner Downey asked if a definition of direct and control is needed or if 18205 is necessary at all.

Ms. Donovan replied that the factors in 85311 are clear and 18205 is unnecessary. The factors are easy to apply and have been applied for some time.

Chairman Randolph asked Ms. Donovan for an opinion on the reporting issue regarding listing the entities versus having the form just state “and affiliated entities.”

Ms. Donovan replied that “and affiliated entities” would be preferred because the name of the filer changes frequently due to specific projects.

Commissioner Downey interjected that it is necessary to go through the process of figuring out which entities will be aggregated when filing so there should not be an issue with adding that list to the filing.

Ms. Donovan agreed with Commissioner Downey but noted that the active subsidiaries can change each reporting time.

Chairman Randolph asked for any other public comment.

Chuck Bell, of Bell, McAndrews, and Hiltachk, echoed Ms. Donovan's remarks in this extremely complicated area. What is left after an extensive regulatory process is the remaining opinions and the amendment that is set forth in Prop 34. There has been a consensus reflected in 85311. To the extent that there may be differences in terms of what level these rules apply, state versus local, whether they apply to reporting or to limits or both; there needs to be some coherence there. The suggestion is to focus the whole project on coherence and then not try to complicate the rules by trying to redefine "direction and control" and "complete independence."

Chairman Randolph asked for any other public comment.

There was none.

Chairman Randolph stated that continuing to move forward with 18215.1 is important and staff's recommendation to codify 85311 and *Lumsdon* and *Kahn* as it related to other aggregation issues is very useful. 18205 may be wading into a difficult area and really depends on the facts of particular situations and how those facts fit into the standard in 85311. It may be one of those examples where it cannot be defined any more than it already has been. As for the idea of including all of the affiliated entities under the name of filer; given that it is disclosed elsewhere in the same report it may not need to be changed.

Commissioner Downey stated that 18215.1 deserves to go forward and questioned the need for defining the word "aggregate." If there has not been any trouble with that, the definition is not necessary, the regulation mirrors 85311. Regarding 18205 raises the question of whether it is even needed at all, and then if it is needed, it would really need some fine tuning.

Chairman Randolph asked if the Commission wants to see 18205 come back at all.

Commissioner Blair said that there does not seem to be a reason to bring it back.

Commissioner Downey added that with all the public comment against 18205, there does not seem to be a purpose.

Chairman Randolph said the Commission is leaning toward codifying the status quo.

Commissioner Downey stated that there did not seem to be much support from the regulated community.

Chairman Randolph said that there has not been a compelling reason to change the status quo. Therefore, just eliminate 18205 completely. The 18428 regulation should come back for further discussion.

#### **Item #20. Discussion of Adoption of Regulation 18438.5.**

Bill Lenkeit, Senior Commission Counsel, presented a project concerning the contribution limits imposed by section 84308, which prohibit contributions of more than \$250 from any party or participant to a proceeding involving a license permit or other entitlement for use. Additionally, any official who receives a contribution in excess of \$250 from a party or participant in a proceeding must disclose the contribution in the record of the proceeding and is prohibited from participating in the matter. This project was proposed by the Enforcement Division in order to address a potential problem in enforcement of section 84308 based on factors presented in one of its investigations. In that case, an official who was a member of a local airport authority considering a major expansion of an airport received a contribution from an entity related to one of the parties that was being considered a contractor to perform the expansion project. The company making the contribution was an out-of-state corporation. Although the party that was being considered for the contract was a wholly owned subsidiary of the out-of-state corporation, the entities had separate boards of directors and the person authorizing the contribution did not have direction and control of the contribution decisions of the party that was the subject of the proceeding. In order to address the situation, the language presented in the proposed regulation would apply a conflict of interest standard to the proceedings under 84308 rather than the campaign standard of direction and control. The method used, provided under subdivision (a) of proposed regulation 18438.5, is to expand the definition of party to include any person who is a parent, subsidiary of, or "otherwise related business entities" as those terms are defined under the Act's conflict-of-interest rules, to the subject of the proceeding. In so doing, the parent, subsidiary, or otherwise related business entity would be required to disclose, under section 84308 (d), any contribution made over \$250 to any officer of the agency holding the proceeding, as well as be prevented from making any contribution of more than \$250 during the proceeding or for three months thereafter.

Mr. Lenkeit explained that the language presented in subdivision (a) is substantially the same language presented to the Commission in 2000 when it previously considered the issue. Unfortunately, the project which considered other amendments to the regulations under section 84308 never reached completion and ended after the pre-notice stage. Because of the recent enforcement concerns, staff believes this issue should once again be examined by the Commission and seeks direction as to whether the application of a conflict-of-interest standard to section 84308 proceeding would be appropriate, or whether the direction and control rules should remain the same. Under the conflict standard, all contributions made by a parent, subsidiary, or otherwise related business entity would be aggregated for purposes of the requirements of section 84308. If the campaign standard remains the rule, only those contributions directed and controlled by the same person would be aggregated.

Chairman Randolph asked if there were any questions in this item.

Commissioner Huguenin asked if there is any other place in the Commission's jurisprudence that this related business entity concept, which casts a much broader net, comes into play currently.

Chairman Randolph confirmed that the question pertained to outside the conflict of interest area.

Ms. Menchaca replied that there were none that staff is aware of.

Commissioner Huguenin asked if this is currently the standard in the conflict of interest area.

Mr. Lenkeit replied that it is currently the standard.

Chairman Randolph stated that this being the current standard in the conflict of interest area is one reason that it may be a good idea to import this to 84308 because when the public is considering whether or not there is conflict when filling out the SEI, one issue to look at is whether or not there is a parent, subsidiary, or otherwise related business entity involved in the analysis for sources of income and potential sources of disqualification. It is something that an official that is subject to 84308 is already familiar with, therefore, it would make sense to continue the standard in this context.

Commissioner Blair confirmed that 84308 does not apply to elected officials.

Mr. Lenkeit agreed but added that the regulation would apply if the elected official sits on the board of another agency.

Commissioner Blair mentioned a concern about the possibility of a campaign contribution being potentially disqualifying.

Chairman Randolph explained that this is the only context in which a campaign contribution would be a potential for disqualification. This particular issue tends to come up when an individual is, for instance, on a planning commission and is running for city council. Therefore, that individual would be collecting contributions while, at the same time sitting as an appointed official on the planning commission looking at land use applications.

Commissioner Blair asked if the contribution could be returned in order to vote on the planning commission.

Chairman Randolph replied that contributions have to be returned within 30 days.

Chairman Randolph asked for any public comment.

Mr. Bell commented that the legislature put a conflict rule in the contribution section that is complicated because it does not apply to a city council or a board on supervisors when they sit in their regular capacity but when appointed to a regional board, the rule does apply. Not only does it apply to contributions received but also to solicitations. When identifying what is a party and what is a participant, there is more confusion there. This has been a problem for the

agencies and well as the candidates and officials that have to deal with is. There are certain procedures that must be followed in order to get the disclosure about contributions made by parties or participants. It may be useful to talk to some of the local agencies about the way this is handled because it is a challenge to an official who is serving on one of those agencies and is a candidate or office holder soliciting campaign contributions to know when the proceeding starts.

Chairman Randolph suggested separating this issue from the aggregation project and consider the proposal, while doing more outreach to get additional input about what the impact of the proposed regulation would be. There could also be a separate interested persons meeting if necessary.

Commissioner Huguenin mentioned that there may be a connection with the issue of whether the aggregating or affiliated entities file all of their names on each report. If a city councilman who sits on the planning commission has been receiving contributions from a developer who is a subsidiary on a project somewhere else that files jointly, that information would be available for the councilman looking for conflicts.

Mr. Bell responded that most local jurisdictions and city and county major donor reports are not online and the reports may only be picked up if the donor in question happened to be a state major donor.

Commissioner Huguenin reiterated that if the reports were online, they could be searched and come up with the name of the sub-entity that is not listed as a filer. If the reports were only on paper, having the entities listed as filers on the front page may make the job of the person looking through the reports easier.

Mr. Bell said that the rules that are set up for agencies to implement this rely largely on the part of the party or participant to self disclose. It seems like a reasonable way to approach that.

Commissioner Huguenin agreed that it would be better to rely on the person receiving the money having the obligation first to report it.

Ms. Donovan responded to Commissioner Huguenin's comment saying that there are two different standard being considered. The one that is proposed in this regulation is the conflict of interest related business entity standard, rather than direction and control. Therefore, if there is a relation but no direction and control, there will not be disclosure of the non-affiliated business entities that operate independently with respect to their contributions, on the major donor reports. What this proposes is to use a different standard of conflict of interest affiliation and business entities. 84308 is a hybrid between an contribution limitation requirement and a conflict of interest requirement.

Chairman Randolph suggested that this may be a reason to use a direction and control standard.

Chairman Randolph stated that this issue would be broken up into a separate project and come back to the Commission at a later date.

There was no objection.

**Item #21. Discussion of Proposed Regulation 18371 - Local Agency Ethics Training.**

John Wallace, Assistant General Counsel, presented an item that implements AB 1234, which was chaptered in 2005. Due to the wide interest in timely compliance with the new requirements of the bill, this proposed regulation has already been noticed in the Office of Administrative Law and if the Commission should agree with staff's proposed draft, it can be adopted. By way of background, AB 1234 requires local agencies that provide reimbursement for expenses to members of the legislative bodies to adopt a written policy regarding local agency compensation and reimbursement and also to provide ethics training to local officials. AB 1234 amended several different California codes including the government code, however, none of those sections are in the Act. The only way the Commission is involved in this new set of statutes is that it is expressly mentioned in section 53235(c). In that section, the persons developing the ethics training are required to consult with the Commission concerning PRA provisions.

Mr. Wallace explained that regulation 18371 was drafted to implement this duty of the Commission. Specifically, looking at the regulation language, it starts in subdivision (a) with a comprehensive list of all state ethics laws required to be included in the training. Although some of the sections are non-PRA sections, they are included to make it easier for the public to comply with the new requirements. He also noted that in the text of the language, there is some shaded text. This is language that was added after the regulation was noticed and before it was distributed with the memorandum. Subdivision (b), in contrast to subdivision (a), actually sets out the areas in which the Commission will be advising on in terms of the preparation of the ethics training. Subdivisions (c) and (d) are the decision points for the item, which set out the rules for the consultation that would be implemented today. Specifically, subdivision (c) allows the trainer to, in essence, self-certify the training. In response to a public comment that the language of (c)(1) suggested that only live trainings were permitted, staff suggested adding some new text to the end of subdivision (c)(1). The new text added would be "or training program is developed, and every year thereafter." There was no objection.

Mr. Wallace described the two options in subdivision (c). One option would be to simply require the trainer to incorporate the Commission's statutes and regulations in the training and the other would be to set aside a portion of the Commission's website to set out materials that would have to be incorporated. With respect to option two, there are several outlines in the various topic areas that the Commission is expected to consult on and staff envisions in the future having an interactive system of training available for local officials as well. Staff is supporting the second option because it allows the Commission to continuously update the materials and make sure that they are current.

Mr. Wallace explained the last decision point, subdivision (d), would allow trainers to get substantial reviews of their training programs through the Commission staff. There could be upwards of 3,000 agencies on the local level subject to the bill and there is no appropriation under AB 1234 for the Commission, therefore there is concern about the ability to take on that type of a task. Staff has taken a neutral position on subdivision (d), on whether to include that at all.

Mr. Wallace concluded with information that Ted Prim, of the Attorney General's Office, and the Commission are working together to put together some kind of free training, which would hopefully be available on the internet so that districts will be able to get the training without having to pay out money. However, it is not likely to happen immediately.

Chairman Randolph added that Mr. Prim deserves much credit for his tireless work in attempting to get content, software, a server, and ongoing maintenance of the system. There has been discussion regarding the Commission possibly providing the resources for hosting the system either on the website or via internet provider where the Commission would interface with the provider and would pay the monthly fee to maintain the training in a website managed by staff. Staff will continue looking at this option with Mr. Prim to determine the cost to the Commission. The Institute for Local Government is also providing some of the funding and content for this project. Hopefully there will be some kind of free system online soon.

Commissioner Remy wondered if there would be a way to have the Institute for Local Government and possibly the Special Districts Association could help come together with funding but also get recognition on the website so that each of them would get a certain amount of visibility and credit, and have an ongoing cooperative project between the Commission and these organizations at the local level.

Chairman Randolph said that the idea Commissioner Remy suggested is very similar to what is currently being looked at with Mr. Prim. Part of the issue is that these entities will most likely develop their own trainings that would be more extensive, and more interactive and live. Therefore, this will just be one option for entities to have. Most of the resources would most likely to go into the development of individual training programs.

Mr. Wallace added that many of the local jurisdictions want to incorporate their own programs in order to incorporate their local rules.

Commissioner Remy asked what the penalty would be if these local agencies do not comply with the training requirement.

Mr. Wallace replied that because it is outside the PRA is not enforced by the Commission, there are no penalty provisions.

Chairman Randolph asked if there was any public comment.

Mark Morodomi, of the Oakland City Attorney's Office, expressed some concerns in a private capacity. The first concern is regarding subdivision (a) giving the impression that the Commission has jurisdiction in areas that it does not. The second concern has to do with the language in the regulation of what is required or what should be required in the trainings. The confusion is about whether or not a certain topic being accidentally left out of the training is a violation. The suggestion is to eliminate subdivision (a) and take out lines 14 and 15. The remainder of the regulation addresses what the statute requires the Commission to do, which is provide consultation.

Chairman Randolph suggested changing “must” in line 14 of page 2 to “should” to reduce the confusion.

Joann Speers, of the Institute for Local Government, addressed the Commission regarding the ethics training and the number of requirements needed to complete the training. The learning objective in these types of courses is two fold. The first objective is to alert people to the facts that these requirements exist and to motivate them to take these requirements sufficiently seriously. With all the requirements, getting too far into the laws themselves during training is difficult. Option one would be a better way to get people to have a better grasp on the importance of these laws and this training.

Mark Marshall, County Supervisor in Colusa County, said that it is very unfortunate the ethics training is necessary for elected officials. They should be unnecessary. Regardless, the concern with this regulation is one of timing. It was mentioned that there was no fiscal impact to local agency but that is not true. The \$99 per person fee creates a big impact. The sixty day review prior to the training is also not realistic.

Chairman Randolph interjected to clarify that the process of submitting is decision point 2, and is currently drafted as optional. If the Commission decides to include that provision, even if that provision is included in the regulation, it would still be optional and the self certification process could still be used.

Mr. Marshall stated that online training would be very useful for local agencies and would be very easy to update.

There were no further public comments.

Chairman Randolph suggested option 1 and preferred to simply indicate statutes and regulations rather than the specified legal information because it does not appear clear that not all the fact sheets for that area have to be incorporated. If the goal is to make sure that all information is kept current, then that is covered in the statutes and regulations.

Commissioner Blair asked if the staff would have an easier time enforcing this if it was clear that every training had the specific legal information set forth on the Commission’s website.

Chairman Randolph replied that it is not known at this time if the Commission will be enforcing this statute.

Mr. Wallace said that the difficulty with this training is that these are not PRA sections at all and the Commission’s only role is in the consultation. What is being drafted is more of a process of how it will be done, instead of something that will result in punitive action if not done. Either approach is viable and that is why there are two options.

Commissioner Remy stated that option 1 would allow the opportunity to start modestly and move forward toward possibly expanding later. There is a substantial gap between the current

work load and resources, and it does not seem logical to take on more. Possibly down the road but not now.

Chairman Randolph added that there may be a concern about the quality level of the programs and maybe after the training starts, it will be clear if a review of the programs by staff is necessary.

Commissioner Blair supported option 1 because it would give the entities more flexibility and moved to adopt the regulation.

Chairman Randolph stated that the motion would be to approve 18371, including option one under decision point one and deleting decision point two.

Commissioner Downey seconded the motion.

Commissioner Remy asked about the suggestion to change line 14 on page two from “must” to “should”

Commissioner Blair made a new motion to adopt the regulation. Commissioner Downey seconded the motion, which passed with a 5-0 vote.

## **Item #22. Discussion of Proposed Regulation 18361.10 - Designation of Certain Adjudicated Decisions as Precedent.**

Andy Rockas, Legal Division Counsel, presented proposed regulation 18361.1 which is currently being considered for adoption. As explained during pre-notice discussion last November, the proposed regulation would set out guidelines and procedures through which the Commission might increase the predictability and uniformity of its adjudicated decisions by facilitating the creation of a body of agency case law. More specifically, the proposed regulation would provide the Commission with the framework through which it might begin to designate all or parts of administrative enforcement decisions as having precedential value. At the pre-notice hearing of the regulation, the Commission indicated its desire to create a process of designating or overruling precedent that would allow for input from both parties and non-parties. For this reason, language in the regulation’s first subdivision states that the designation or overruling of precedent may be made at the request of “any person.” Under the regulation as currently drafted, the input from non-parties would be submitted in a public setting through a process similar to that used by the Commission in developing formal opinions. Based upon these considerations, staff had developed the following suggested regulation, which now consists of eleven subdivisions and four decision points. As before, subdivision (a) simply lays out the scope of the decisions to which the regulation would apply. That is, administratively adjudicated enforcement decisions. Therefore, for instance, stipulated settlements could not be deemed precedent. On the other hand, default decisions could be considered for precedent designation unless you vote to include language like that suggested in decision point one. Staff recommends including such language.

Mr. Rockas continued with decision point two which has language that would strictly limit the application of this language to only those proposed ALJ decisions which issue after the adoption of this regulation. Staff believes that decision point two is a policy call for the Commissioners to make. In addition, subdivision (a) also describes the Administrative Procedure Act (APA) standard a decision must meet before it can be deemed precedent, that is, it must contain a significant legal policy determination of general application that is likely to recur.

Mr. Rockas explained that the language in subdivision (b) regarding the indexing of precedential decisions for future use has not changed from the pre-notice version of the regulation. Subdivision (c) reads as it did in the pre-notice version and sets out a list of suggested factors for the Commission to consider in deciding whether to designate or overrule precedent. Subdivision (d) sets out two options for a process by which input from parties and/or anyone from the public could argue for or against precedent designation. The two options are designated as decision points 3(a) and 3(b). The second option is much like the pre-notice version. It is a statement that indicates that the Commission will only designate precedent after it makes a final decision on the merits of the case involving the parties. It contains no detail as to how that would specifically be accomplished. The first option, decision point 3(a) is a new and more detailed description of process suggested by the Chairman after the pre-notice meeting. Decision point (a) suggests a tentative ruling system. Under this system, the Commission would consider argument from the parties only regarding both the merits of a proposed ALJ decision and whether the Commission should consider designating a proposed decision as precedent. This system would specifically allow the parties to argue about precedent before public comment on precedent were entertained. The Commission would then issue a final decision on the merits and the case and a suggested or tentative ruling regarding precedent at the same hearing. The Enforcement Division supports the tentative ruling system and the Legal Division is neutral.

Mr. Rockas mentioned regarding the last sentence of subdivision (a), defining the word “final.” The language, as it is currently written, states that a decision becomes final when the Commission has made a decision on the merits and either the time to file a petition for reconsideration has expired or a petition for reconsideration has been granted and the reconsideration process has concluded. The CPAA suggests a third possible scenario that might occur which should make a decision final and that is when a petition for reconsideration is filed by one of the parties is filed and denied. Staff has no objection to the addition of the language that would accomplish that.

Mr. Rockas went on to explain subdivisions (e) and (f). After a decision on the merits is deemed final, the Commission will then, through the Executive Director, entertain public input regarding precedent designation from the public. This screening process was suggested by several Commissioners at the pre-notice hearing. If no requests are received during the thirty days following a decision on the merits becomes final, the Commission will then be free to treat its tentative ruling concerning precedent as a final ruling, if it so chooses. Subdivisions (g), (h), and (i) explain how a non-party request regarding precedent designation will be screened by the Executive Director before reaching the Commission for consideration.

Mr. Rockas added that CPAA has another suggestion that language be added so that if a tentative ruling were never acted upon by the Commission, it would automatically become final within a

set period of time if no further comments were submitted. Since this suggestion fundamentally changes the process as currently laid out in the regulation, the language in earlier subdivisions would most likely have to be reworked.

Mr. Rockas explained the last two subdivisions. Subdivision (j) makes explicit that the Commissioners retain autonomy with regarding to the designation or overruling of precedent and are not bound by the process specified for argument by all others. Subdivision (k) is taken directly from the APA and explicitly takes that the Commission's decisions regarding precedent do not constitute rule making and are not subject to judicial review.

Chairman Randolph asked for any questions from the Commission.

There were none.

Chairman Randolph asked for any public comment.

Stephen Kaufman, of Kaufman Downing, appearing on behalf of the California Political Attorneys Association addressed the Commission to reiterate the comments and suggestions made in a comment letter. There is a reference in the letter to having the decision making process with respect to a tentative ruling played out in a public setting in open session. Discussions with staff since submission of the letter have explained why there is a need to have decisions rendered in closed session. As long as the parties have ample opportunity to address the Commission on both decisions, the decision on the merits and the tentative ruling, in a public hearing and then the public has the opportunity to comment and a final decision is made in open session, then it would be acceptable to have the tentative ruling done in the same manner as the decision on the merits is rendered.

Chairman Randolph said that the concern was that having two separate discussions would be difficult. As long as there is opportunity for input from the parties and the public, it meets everyone's needs.

Mr. Kaufman agreed with the Chairman.

Chairman Randolph asked for any questions.

There were none.

Chairman Randolph opined that decision point one should be included, which would eliminate default judgments, and decision point two as well. The tentative ruling decision, 3(a), should be included and the language suggestion on page 3, line 8 should also be kept. With regard to decision point four, there does not seem to be a problem with the Commission receiving a copy of any denial.

Commissioner Blair stated that the default on 3(a) should be that the Commission come back and take an affirmative step before it becomes final.

Commissioner Downey agreed that the process would be cleaner that way.

Commissioner Blair expressed agreement with all of the suggestions made on this item.

Commissioner Remy suggested, regarding decision point four, that rather than getting a copy of every denial it could be included in the Executive Director's report.

Chairman Randolph responded with new suggested language "shall inform the Commission of the denial." She also suggested that staff reword the language where suggested by the Commission and return after Closed Session to review.

#### **Item #23. Legislative Report.**

Mark Krausse, Executive Director, informed the Commission of SB 1120, which was introduced this month, that would increase Commission funding and would specify that the General Fund pay any attorney's fees resulting from a successful challenge on the PRA. If passed, SB 1120 would take effect on July 1, 2007. The Commission took a "sponsor" position on the bill.

#### **Item #24. Executive Director's Report.**

Mr. Krausse welcomed two new attorneys recently hired by the Enforcement Division, Kourtney Vaccaro and Tom Dyer. He also welcomed Leon Schorr, a Deputy District Attorney in San Diego, who will be working in the Enforcement Division for 6 or more months as part of a cooperative agreement.

Mr. Krausse gave an update on the Governor's budget that has been released and includes an additional \$700,000 for the Commission and included \$164,000 in funding to implement the recently passed SB 8, which extends revolving door restrictions to local officials.

In response to a question from Commissioner Remy regarding opposition to the Ortiz Bill, Mr. Krausse explained that it is possible that there would be some opposition but hopes that the Commission can overcome any potential opposition due to the recent press coverage of our funding issues which has been helpful.

#### **Item #25. Litigation Report.**

Luisa Menchaca reported that there was nothing to add to the written report.

Chairman Randolph adjourned to closed session at 1:12 p.m..

The meeting reconvened at 2:25 p.m.

Chairman Randolph reported that in the Matter of Allen Settle, having considered all the evidence on the record and the factors in regulation 18361.5 (d) the Commission adopts the attached proposed decision of the Administrative Law Judge in its entirety, effective January 23, 2006.

Chairman Randolph said there was no further reportable action taken in closed session.

**Item #22. Discussion of Proposed Regulation 18361.10 - Designation of Certain Adjudicated Decisions as Precedent.**

(Discussion continued from earlier.)

Chairman Randolph noted that there are proposed changes to regulation 18361.10 offered by Mr. Rockas.

Mr. Rockas explained that subdivision (a) on the first page, second line, should read, “not resulting from a default judgment.” This incorporates decision point 1. On the third line of subdivision (a), it should read, “and which issue as proposed decisions after the adoption of this regulation.” This incorporates decision point 2. Then, on the second page, the third sentence of subdivision (d) would read, “Any tentative ruling issued shall be acted upon by the Commission within 100 days after a decision on the merits becomes final.”

Chairman Randolph suggested a language change on the following line which says, “A tentative ruling regarding precedent or overruling...;” she said that does not make sense and needs to be fixed. She continued that the next phrase should read, “...is not final and shall have no precedential effect until it is separately acted upon.”

Mr. Rockas commented that the term, “tentative ruling” regards precedent, and “overruling” regards past precedent.

Commissioner Downey thought it might sound better to say, “A tentative ruling is not final.”

Chairman Randolph agreed.

Commissioner Blair clarified that the end result would read, “A tentative ruling issued shall be acted upon by the Commission within 100 days after a decision on the merits becomes final.”

Chairman Randolph said that was correct. She added that this would set an outward deadline that the Commission would have to review the tentative ruling within a hundred days after the decision on the merits.

Commissioner Blair asked if the phrase “on the merits” was necessary.

Mr. Rockas said that it was necessary to make a distinction between decisions about merits versus decisions about precedent.

Chairman Randolph added that the next sentence would read, “A tentative ruling is not final and shall have no precedential effect until it is separately acted upon.”

Commissioner Downey said that sounded perfect.

Mr. Rockas moved to the last sentence in defining what is “final” and said he incorporated the language suggested by CPAA to say on the last line of (d), “or a petition for reconsideration has been denied.”

Commissioner Downey asked if the word “either” was necessary.

Chairman Randolph suggested cutting out the last clause and say, “and a petition for reconsideration has been granted or denied, and the reconsideration process has concluded.”

Mr. Rockas agreed and read the final version of the last sentence of (d), saying “For purposes of this regulation, and with reference to two Cal. Code Regs. section 18361.9(c), a decision becomes ‘final’ when the Commission has made a decision on the merits, and either the time to file a petition for reconsideration has expired, or a petition for reconsideration has been granted or denied and the reconsideration process has concluded.”

Chairman Randolph approved of that reading.

Commissioner Downey asked about the phrase “reconsideration process has concluded,” and wondered what else could possibly occur.

Mr. Rockas responded that if it is granted, then it may come back to the Commission for the Commission to sit as its own judges, and that process would be sometime before it would want to deem the decision as final.

Commissioner Downey understood, opining that the reconsideration process would continue in that sense.

Mr. Rockas went on to subdivision (e), saying in the second sentence, the first phrase prior to the comma on the second sentence would read, “Where no tentative decision has issued...”

Chairman Randolph said she did not think that is how it should read.

Mr. Williams explained that there is an issue as to whether the tentative ruling process is wholly within (d), and then looking at subdivision (e) et. seq. as a stand-alone provision. If they are, then they need to be separated out to stand apart.

Chairman Randolph asked why the language is needed. She added that they stand apart on their own.

Mr. Rockas responded that if the phrase, “Where no tentative ruling has issued...” is not added, then where tentative rulings have been issued by the Commission, any requests that come in to act on precedent would then get funneled through the Executive Director. He added that he was under the impression that Commissioners did not want that to happen.

Chairman Randolph did not understand why that was a problem. If the Commission says it will make a tentative ruling to make the ALJ's finding about foreseeability precedential and then someone else comes in and wants to make a request that the ALJ's findings about the public generally exception be precedential, then they would use the process in subdivision (e). So they are not necessarily mutually exclusive. She asked if it would be a problem if someone considers a request because it seems it would be agendaized along with the Commission's tentative ruling.

Ms. Menchaca said she wanted that in there because she was not certain that the hundred days in subdivision (d) would coincide with subdivision (e). In looking at the time period of 30, 14, and 60 days, for that process to occur, it might be consistent... If you said 120 days, then regardless of how it was initiated, either process could still be concluded by the time the Commission had to act on it. She was not sure that 100 days would do it.

Commissioner Huguenin commented that 45 days down the road before the Executive Director has to make a decision about whether to grant or deny the request is about half way through the 100 day period before the Commission gets it on the agenda.

(Commissioner Remy left the meeting.)

Chairman Randolph asked whether the timeline would work if it said 120 days instead of 100 days.

Mr. Rockas replied that the longer it is, the more likely it will work. The problem is that the breakdown changes depending on the contingencies that are triggered in the subdivisions.

Chairman Randolph made some quick calculations and suggested changing "100 days" to "120 days." She wondered whether there would be a situation where a request is submitted for a tentative ruling that is duplicative of the Commission's tentative ruling or addresses a separate issue. Would the Executive Director take advantage of every single day in the timeline knowing that the Commission is about to schedule the matter anyway?

Mr. Rockas said he is trying to plan for the maximum theoretical timeline based on the content of the subdivisions.

Chairman Randolph said the Commission should go with the 120 days.

"And then strike 'Where no tentative ruling has issued,' right?" asked Ms. Menchaca.

Chairman Randolph said that was right.

Commissioner Downey referred to the last sentence of subdivision (e). He suggested getting rid of the word, "either" again.

Mr. Rockas agreed. He moved on to subdivision (f)(2), saying that the suggested rewording by CPAA was not objectionable and was therefore incorporated.

Chairman Randolph said that decision point 4, in subdivision (g) says, “the Executive Director shall inform the Commission of the denial...”

Mr. Rockas said this is in lieu of “give the Commission a copy” in order to save trees.

Chairman Randolph said that under subdivision (e), on the third line, it should read, “that all or part of such a decision be deemed precedent or not deemed precedent.”

Mr. Rockas suggested that it read, “be deemed precedent, not be deemed precedent, or that all or part of a previous related precedent be overruled.

Commissioner Downey asked about subdivision (j) and asked if staff was okay with the first sentence.

Mr. Rockas said he was not.

Mr. Williams suggested using the term, “Notwithstanding...”

“...subdivisions (e) through (i) of this regulation, a Commissioner may request that all or part...” continued Chairman Randolph.

Commissioner Downey moved to adopt proposed regulation 18361.10 as amended.

Commissioner Blair seconded the motion.

Commissioners Downey, Blair, Huguenin, and Chairman Randolph supported the motion, which passed with a 4-0 vote.

The meeting adjourned at 2:53 p.m.

Dated: January 20, 2006

Respectfully submitted,

---

Kelly Nelson  
Commission Assistant

Approved by:

---

Liane Randolph  
Chairman